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No. 06-523

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
JAN 19 2007
OFFICE OF THE CLERK

DEBORAH L. PATRICK, Warden, *Petitioner*

v.

SHIRLEY REE SMITH, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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I.

STATEMENT OF THE CASE

The following summary, based upon the state court trial transcript, is provided in order for this court to have a more complete statement of the evidence which was presented at Respondent Smith's state court trial in 1997.

The State's principal expert witness, Dr. Stephanie Erlich, was an associate deputy medical examiner in the Los Angeles County Coroner's Office and was primarily responsible for the autopsy performed upon the victim, Etzel Smith. At the time she performed the autopsy, Dr. Erlich had been involved in some fifty pediatric autopsies, and this case was assigned to her because it was presented to the coroner's office as a Sudden Infant Death Syndrome case. Dr. Erlich had never previously performed an autopsy in a case involving suspected child abuse. Dr. Erlich was not board certified in forensic pathology.

With respect to the small amount of blood found inside the skull, Dr. Erlich testified that the blood included both old and new blood. Dr. Erlich testified that the blood inside the skull was not the cause of death since there was an insufficient amount to cause any significant pressure on the brain. Dr. Erlich also testified that pressure on the brain stem was not the mechanism which caused death.

During Erlich's inspection of the infant, she saw no bruises or abrasions, nor did she see any physical organic injury to the brain, other than the minimal hemorrhaging. During the gross autopsy, no physical injury to the brain was found and no retinal hemorrhaging was found. There were no fractures of the skull.

A microscopic examination of the brain performed during the subsequent neuropathological examination indicated chronic subdural hematoma, bleeding which was two weeks or more old. Erlich admitted that this type of chronic subdural hematoma is consistent with some Sudden Infant Death Syndrome (SIDS) cases.

Erlich agreed that in Shaken Baby Syndrome cases, a principal cause of death is substantial hemorrhaging inside the skull, causing significant pressure upon the brain which ultimately compresses and destroys the brain stem. Erlich agreed that the amount of blood found inside the infant's skull was not sufficient to raise the intracranial pressure inside the skull and was not the cause of death.

Erlich also agreed that substantial swelling of the brain itself, which also compresses and destroys the brainstem, is another principal cause of death in Shaken Baby Syndrome cases. Erlich found no swelling of the infant's brain and no herniation of the brainstem. Erlich agreed that the brain stem was intact and

was not even sectioned during the autopsy. Erlich testified that the cerebellum was grossly normal, with no hernation of the brainstem.

Elich testified that in her opinion the mechanism which caused death was a shearing or tearing effect within the the brain itself, however she stated that there was no physical evidence of this shearing or tearing effect which was observed during the autopsy or the subsequent neuropathological examination of the brain.

The State's second expert witness, Dr. Eugene Carpenter, Jr., a medical examiner also employed by the Los Angeles County Coroner's Office, was Dr. Erlich's immediate supervisor. Carpenter was present for the first 5 - 10 minutes of the autopsy, returning later to the autopsy room after Erlich had found a small amount of blood on top of the brain.

Carpenter agreed that there was 1 - 2 tablespoons of partially clotted blood found on top of the infant's brain, as well as adherent or old blood on the brain, a sign of an injury which had occurred days or weeks prior to death. Carpenter testified that the older blood was the result of an injury in the same location as the fresh blood at the top of the brain.

Carpenter and Erlich both testified that retinal hemorrhaging, which is typical in the vast majority of Shaken Baby Syndrome cases, was not found in this case. Carpenter stated that fractures of the ribs at the back of the rib cage,

bleeding at the joints at the back of the neck, bruises of the arms, and internal injuries to the abdominal organs are also symptomatic of Shaken Baby Syndrome cases. While there was an extremely small external abrasion to the infant's head, Carpenter agreed that this injury was not the cause of death. Carpenter also agreed that no bone fractures were found in this case, nor were there any sprains or hemorrhaging of any joints in the neck. Similarly, there was no displacement or dislocation of any of the infant's joints.

Carpenter agreed with Erlich that the infant did not die as a result of massive bleeding in the brain, nor did the infant die as a result of any significant swelling of the brain, which would compress and destroy the brainstem.

Carpenter testified, in his opinion, that the baby died from "direct injury to the brain, injuring vital areas of the brain. The shaking caused direct damage to the vital areas of the brain. There was tearing of the brain that could be seen by the microscope only if the baby survives for several days before they die. When they don't survive, then they die quickly. The body had no reaction, there is no swelling of the torn fibers of the brain and that damage cannot be detected . . ." R.T. 694. (Emphasis added).

Carpenter testified that there were no findings at autopsy or during the subsequent neuropathological exam which indicated that the brain or the

brainstem was other than normal and intact.

Despite having found no injuries to the brain or the brainstem which could have caused the infant's death, both Erlich and Carpenter opined that the baby died as a result of Shaken Baby Syndrome.

In rebuttal, the State called Dr. David L. Chadwick, a pediatrician. Dr. Chadwick had never performed an autopy, nor was he board certified in any field related to pathology. Chadwick testified that he reviewed the medical reports and opined that due to the bleeding in the infant's head and the small abrasion on the outside of the head, this was a Shaken Baby Syndrome case. However, Chadwick agreed that there was no large volume of blood within the skull and the blood which was found was not causing the infant any difficulty. Chadwick also agreed that in at least 80 percent of the Shaken Baby Syndrome cases, there is evidence of retinal hemorrhaging and no retinal hemorrhaging was present in this case.

Chadwick thought that the mechanism of quick death occurs when neurofibers in the brain which affect the vital centers are damaged. However, Chadwick agreed that there was no evidence revealed in the neuropathological report showing damage to the nerve centers attached to the brainstem, nor was there any evidence of specific brain injury.

In her defense, Respondent Smith called Dr. Richard Siegler, a pathologist

who had worked at Martin Luther King Hospital in Los Angeles, California, for more than 20 years, had taught pathology at UCLA Medical Center and USC Medical Center, had published some 14 books and articles related to pathology, and had performed some 5,000 - 8,0000 autopsies during his medical career, including autopsies on children with trauma to the brain.

Dr. Siegler testified that he reviewed all of the medical reports and materials related to the case. The medical reports confirmed that there was no massive bleeding or swelling of the brain which would indicate the rotational trauma to the brain found in Shaken Baby Syndrome cases. While there was head trauma, it was not fresh trauma. Both the neuropathological exam and the eye pathology exam confirmed chronic bleeding, trauma that occurred weeks prior to the infant's death.

Siegler agreed that massive bleeding or massive swelling of the brain are the two primary causes of death in Shaken Baby Syndrome cases. In the absence of either massive bleeding or massive swelling, Siegler testified that it would be very difficult to determine the cause of death. While there was a small amount of bleeding in the brain in this case, it was not indicative of trauma which was massive enough to produce instant death.

Siegler testified that when the gross autopsy was performed on December 3,

1996, fresh blood was observed. However, a month later, when the neuropathological exam was performed, old blood was found. At that point, Siegler testified that it should have been apparent to everyone concerned that there was a lesion in the brain that was weeks old and the trauma was incompatible with Shaken Baby Syndrome. Siegler testified that the District Attorney's Office should have been notified of the discovery of the old blood, something the coroner's office failed to do.

Siegler testified that he had never heard of infants dying as a result of sudden shearing or tearing of brain tissues such that the respiratory centers of the brain are repressed and death occurs instantly. Such a proposition is "fantasy . . . it is possible, it is also not possible and . . . that is what we call fantasy . . . there is no way to confirm it or deny it." RT 1249. Siegler testified that he had never read any medical literature that dealt with sudden compression which damaged brain tissue and caused death unless there was hemorrhaging. While hemorrhaging was present in this case, it was superficial. The photographs from the neuropathological exam demonstrated that there was no hemorrhaging inside the brain, nor was there any destruction of any tissue inside the brain. The initial diagnosis of death caused by Shaken Baby Syndrome made on December 3, 1996, by Siegler and Carpenter was not supported by the later neuropathological

examination nor the subsequent eye pathological examination.

Sieger testified that when, as a result of an autopsy, coroners are unable to microscopically observe the mechanism of death, they cannot assign a cause of death. In those cases, the cause of death must be signed out as "indeterminate," meaning that they have done the best they can and they really can't say what the cause of death was." R.T. 1162.

Respondent Smith also called Dr. William Goldie, a doctor trained in neurology and pediatric neurology at Standford Medical School, and who had taught neurology at the University of Texas Health Center, the University of Southern California Medical School and the UCLA Medical School. At the time of his testimony, Dr. Goldie was the Director of Pediatric Neurology at the Ventura County Medical Center in Ventura, California.

Dr. Goldie also agreed with the other medical experts that the two recognized causes of death in Shaken Baby Syndrome cases are massive hemorrhaging within the skull which crushes the brain and massive brain swelling that causes the brain to herniate and crush the brainstem.

Dr. Goldie had also reviewed all of the medical records in the case, including the autopsy protocol, the neuropathological report and the eye pathology. He had also reviewed the police reports, paramedic reports and

emergency room reports. Dr. Goldie testified that in most Shaken Baby Syndrome cases the diagnosis is made in a clinical setting with the vast majority of infants surviving. Only rarely is there a confirmation of Shaken Baby Syndrom upon autopsy. Infants suffering from Shaken Baby Syndrome most often present at hospital with injuries including rib fractures, skull fractures, bruising, and brain injuries, such as subdural hematoma and retinal hemorrhages which are usually acute. Infants also present with seizures and coma that are usually the result of acute injury.

Conversely, in Sudden Infant Death Syndrome cases, the usual setting is a healthy, otherwise normal-looking baby with no evidence of trauma, who is found dead in bed. The vast majority of these infants have had some predisposing condition, such as being small for gestational age, which was present in this case. Other predisposing conditions include mothers who have had other children and, most importantly, infants who have been placed on their stomachs, face down to sleep, both factors which were also present in this case. The fact that the infant in this case had jaundice, a heart murmur, low birth weight, and slept on his stomach all made him more disposed to dying from Sudden Infant Death Syndrome.

Based upon his review of the autopsy protocol, the neurological report and the eye report, Dr. Goldie testified that Erlich and Carpenter could not determine

the cause of death in this case. The autopsy findings were trivial and could not explain the infant's death. The brainstem was normal and the condition of the brain itself did not show any serious injury or swelling. There was no evidence of herniation of the brain and the small amount of blood which was found on the brain could not have crushed the brain.

The microscopic bleeding that was found in the frontal and posterior regions of the brain, as well as around the optic nerves, was trivial and did not contribute to the cause of death. There was no evidence of any retinal hemorrhaging which is a hallmark for Shaken Baby Syndrome cases. In severe Shaken Baby Syndrome cases, those cases which result in the infant being near death or one who dies, all such cases exhibit retinal bleeding. In this case there was no blood in the eye itself and no blood into the retina.

In this case, vigorous CPR had been administered by the family and then by paramedics. At least seven minutes of aggressive CPR was performed which can cause microscopic blood in and around the brain. Dr. Goldie testified that an adequate explanation for some of the bleeding in the brain was the result of the CPR.

Goldie testified that death in Shaken Baby Syndrome cases is typically not immediate. Infants are not found dead in bed, rather they have seizures or an

apneic event and are taken to the hospital. Then, if they experience brain swelling, it normally takes hours for the infant to die. There was no massive swelling or massive bleeding in the brain in this case. The findings at autopsy were clinically insignificant and the absence of such findings at autopsy more likely diagnose the case as a Sudden Infant Death Syndrome case. The markers observed at autopsy and during the subsequent neuropathological exam and eye pathology, were classically those of Sudden Infant Death Syndrome cases, as opposed to Shaken Baby Syndrome cases.

During the federal habeas proceedings, Magistrate Judge Patrick J. Walsh, in his report and recommendation to the district court, stated:

> This is not the typical Shaken Baby case. Grandmothers, especially those not serving as the primary-care takers, are not the typical perpetrators. Further, Petitioner [Smith] was helping her daughter raise her other two children (a two-year-old and a fourteen-month-old) and there was no hint of Petitioner abusing or neglecting these other children, who were in the room with Etzel when he died. Still further, there was no evidence of any precipitating event that might have caused Petitioner to

> snap and assault her grandson. She was not trapped in a hopeless situation with a child she did not want or love. Nor was she forced to single-handedly care for a baby that had been crying all day and all night. In fact, there was no evidence that Etzel was doing anything other than sleeping the night that he died. The medical evidence was not typical either, in that some of the tell tale signs usually found in Shaken Baby cases did not exist in this case.

In fact, the baby's mother, Tomeka Smith, was sleeping in the adjoining bedroom, a few feet away from Petitioner Smith and Etzel the night he died.

In the only reasoned opinion issued by any California state court, the California Court of Appeals, affirming Smith's conviction on direct appeal, merely recounted the testimony offered by the various experts and then stated:

> The expert opinion evidence we have summarized was conflicting. It was for the jury to resolve the conflicts.

See Petition, Appendix A, pg. 8.

The Ninth Circuit Court of Appeals dealt with this opinion as follows:

> The California Court of Appeal, in affirming Smith's

conviction, described the expert testimony but did not address the problem presented by the lack of evidence, from the autopsy or ensuing tests, that the brainstem had been sheared. It affirmed with a statement that the experts conflicted and resolution of the conflict was for the jury. With all due respect to the California Court of Appeal, and even with the additional layer of deference mandated by AEDPA, we conclude that the Court of Appeal unreasonably applied *Jackson* when it held the evidence to be sufficient to convict Smith of causing Etzel's death. There was simply no demonstrable support for shaking as the cause of death. As a result of the unreasonable application of *Jackson*, there has very likely been a miscarriage of justice in this case.

See Petition, Appendix F, pg. 1547.

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II.

REASONS FOR DENYING THE PETITION

A. THE NINTH CIRCUIT COURT OF APPEALS DID NOT SIMPLY ACCEPT THE DEFENSE EXPERTS' OPINIONS AND REJECT THE PROSECUTION'S EXPERTS' OPINIONS IN GRANTING THE WRIT OF HABEAS CORPUS, BUT RATHER CORRECTLY FOUND THAT THE PROSECUTION EXPERTS' OPINIONS WERE NOT SUPPORTED BY ANY REASONABLE EVIDENCE.

THE NINTH CIRCUIT'S CONCLUSION THAT THE ABSENCE OF EVIDENCE CANNOT CONSTITUTE PROOF BEYOND A REASONABLE DOUBT WAS CORRECT AND SHOULD NOT BE REVERSED BY THIS COURT.

Petitioner attempts to characterize this case as one in which the Ninth Circuit Court of Appeals re-weighed conflicting expert testimony concerning the cause of the victim's death and substituted its view that the defense experts were more persuasive than the prosecution's experts for the state court jury's view of the evidence. See Petition, pg. 11. As shown below, Petitioner mischaracterizes the Ninth Circuit's decision in an obvious attempt to garner this Court's attention to the case. The Ninth Circuit did not choose the defense experts' testimony over that of the prosecution, but rather found that the scientific evidence agreed upon by all five medical experts in the case did not support the prosecution experts' opinion that the infant died as a result of Shaken Baby Syndrome. The Ninth

Circuit relied upon the admissions of the prosecution's experts, county coroners Erlich and Carpenter, that they were unable to identify through the gross autopsy, the neuropathological examination and/or the eye pathology any physical evidence to support their hypothesis concerning the cause of death. The court found that the absence of any physical evidence of the tearing or shearing of the brain and/or the brainstem, and no other evidence to support death by violent shaking, constituted an absence of evidence which was insufficient to constitute proof of guilt beyond a reasonable doubt in this case. This conclusion by the court was not its choice of the testimony of one set of experts over the other, but rather its finding that there was no physical or circumstantial evidence to support the hypothesis offered by the prosecution's experts.

A federal court's collateral review of a state court conviction does not involve a determination of whether the evidence established guilt beyond a reasonable doubt. Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992), cert. denied, 510 U.S. 843, 114 S.Ct. 131 (1993). Instead, the federal court determines only whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id. If no rational trier of fact could have found proof beyond a reasonable doubt, then the writ is granted. Jackson, 443 U.S. at 324;

Payne, 982 F.2d at 338; Miller v. Stagner, 757 F.2d 988, 992 - 93 (9th Cir.), amended, 768 F.2d 1090 (9th Cir. 1985), cert denied, 475 U.S. 1048 - 49; Bashor v. Risley, 730 F.2d 1228, 1239 (9th Cir.), cert denied, 469 U.S. 838, 105 S.Ct. 137 (1984).

The very existence of the reasonable doubt test set forth in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979), presupposes that juries, accurately charged on the elements of a crime and on the strict burden of persuasion to which they must hold the prosecution, nevertheless "may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. [The test] was adopted to provide an additional safeguard against that possibility, and was to give added assurance that guilt should never be found except on a rationally supportable state of near certitude." West v. Wright, 931 F.2d 262, 268 (4th Cir. 1991), rev'd on other grounds, 505 U.S. 277, 112 S.Ct. 2482 (1992)(quoting Jackson v. Virginia, 443 U.S. at 315, 99 S.Ct. at 2786).

The Ninth Circuit was faced with uncontroverted evidence in many areas, including Smith's personal history, the circumstances surrounding the death of the infant and the physical findings of the gross autopsy, the neuropathological exam and the eye pathology.

First, Smith had no history of violence, no history of any social problems,

no history of child abuse upon her children or her grandchildren, no history of infliction of corporal punishment upon her children and/or her grandchildren and no evidence of any predisposition to commit the violent act attributed to her.

In addition, the infant, Etzel Smith, had no history of any abuse and presented at the hospital with no observable signs of any physical abuse inflicted upon him. The infant had acted normally the evening he died, going to sleep on his stomach in the living room area of the apartment, with his mother asleep a few feet away in an adjoining bedroom. Smith found the infant to be unresponsive and limp at approximately 3:20 a.m. on November 30, 1997. Emergency personnel were summoned, but the infant could not be revived. The initial diagnosis by emergency room personnel was that the infant died as a result of Sudden Infant Death Syndrome.

More importantly, all five medical experts who testified in this case agreed upon the physical findings set out in the autopsy protocol, neuropathological examination of the brain and the pathological examination of the infant's eyes. These findings included the following. Upon gross autopsy, a small amount of fresh blood, approximately 1 - 2 tablespoons, was found on top of the infant's brain. A small abrasion, approximately 1/16 of an inch by 3/16 of an inch, was located on the back lower part of the infant's head. There were findings of recent

subdural and subarachnoid hemorrhages, as well as evidence of old subdural bleeding, and both old and new bleeding around the optic nerves. The experts agreed that the old bleeding observed within the infant's skull had occurred at least days, if not weeks, prior to his death.

Except for the minor bleeding, there were no other findings indicating any trauma to the infant, either internally or externally. There were no fractures of any of the infant's bones, there was no bruising observed on the infant's body, there were no sprains or dislocations of any of the infant's joints, there was no swelling of the infant's brain and no significant bleeding within the infant's skull.

All of the medical experts agreed that the two generally recognized causes of death in Shaken Baby Syndrome cases are massive bleeding within the skull causing downward pressure of the brain into the spinal column which crushes the brainstem and massive swelling of the brain itself which also causes herniation of the brain downward into the spinal column, crushing the brainstem. All medical experts in this case agreed that there was no swelling of the infant's brain which was the cause of death and that the bleeding which was observed inside the infant's skull was insignificant and did not cause the infant's death. The experts all agreed that the small abrasion on the back of the infant's head was not the cause of the infant's death.

The experts all agreed that in at least 80 - 85 percent of cases involving Shaken Baby Syndrome there is observable retinal hemorrhaging. There was no retinal hemorrhaging in this case.

All of the medical experts agreed that in addition to either massive bleeding or massive swelling within the infant's skull, there are usually other observable physical traumas, either internally or externally, to infants who are injured or killed as a result of Shaken Baby Syndrome. There was no observable physical trauma to the infant, either internally or externally.

Most importantly, all of the medical experts agreed that the gross autopsy and subsequent neuropathological examination of the brain did not reveal any observable damage to the brain or the brainstem. Both the brain and the brainstem were normal and intact.

After all five medical experts had agreed upon the physical findings detailed above, the prosecution's experts offered their hypothesis that Smith's assumed violent shaking of the infant had torn or sheared the brain and/or brainstem causing the almost instantaneous death of the infant. The prosecution experts, both coroners working for the Los Angeles County Coroner's Office, admitted that this shearing or tearing of the brain and/or brainstem could not be detected upon their physical examination of the infant. They agreed that there was no observable

evidence in the brain and/or the brainstem confirming their hypothesis as to the cause of death.

Moreover, the prosecution experts did not they testify that they were offering their medical opinions based upon "a reasonable degree of medical certainty" that the child was a victim of Shaken Baby Syndrome. See People v. Ewing, 72 Cal. App. 3d, 714, 140 Cal.Rptr. 299 (1977). In addition, neither coroner testified that they had ever performed an autopsy upon an infant in which they reached a similar hypothesis, that being an infant who died instantly with no observable brain injury. Neither coroner testified that their hypothesis of instantaneous death, without any observable damage to the brain or brain stem, was supported by any recognized medical literature.

Based upon this uncontroverted record, the Ninth Circuit stated:

> All of the prosecution witnesses based their opinion of Shaken Baby Syndrome on their hypothesis that violent shaking had torn or sheared the brainstem in an undetectable way. Their testimony was not that the brain demonstrated death in the usual manor of Shaken Baby Syndrome, caused by excessive bleeding or swelling that crushes the brainstem. Instead, their testimony was that

> death was caused by shearing or tearing of the brainstem and they reached this conclusion because *there was no evidence in the brain itself of the cause of death.* ... This is simply not the stuff from which guilt beyond a reasonable doubt can be established, especially in the face of all the other circumstances, many of which were recited by the magistrate judge, making the crime unlikely. An expert's testimony as to a theoretical conclusion or inference does not rescue a case that suffers from an underlying insufficiency of evidence to convict beyond a reasonable doubt. (Citations omitted). The prosecutions experts' testimony, absolutely crucial to its case, concluded that the cause of death was tearing or shearing of the brain stem when there was no physical evidence of such tearing or shearing, and no other evidence supporting death by violent shaking. Absence of evidence cannot constitute proof beyond a reasonable doubt.

This case has nothing to do with the Ninth Circuit choosing one set of

experts over the other set of experts, but rather the court's correct conclusion that the hypothesis offered by the prosecution experts had no support of any kind from the agreed upon physical findings of the gross autopsy, the neuropathological examination of the brain and the eye pathology of the infant's eyes. There is a significant difference between the opinions of the medical experts based upon observable physical findings and a hypothesis of medical experts which is completely unsupported by any physical findings. The Ninth Circuit was correct in concluding that a defendant cannot be found guilty beyond a reasonable doubt and sentenced to life in prison based upon such an unsupported hypothesis.

B. THE CASE LAW RELIED UPON BY PETITIONER DOES NOT SUPPORT HIS ARGUMENT CONCERNING A VIOLATION OF PRINCIPLES OF CONSTITUTIONAL SUFFICIENCY REGARDING THE REVIEW OF JURY DECISIONS BASED UPON CONFLICTING EXPERT OPINIONS OFFERED AT TRIAL.

Respondent argues that the substantial evidence rule, and the deference it mandates, applies to judicial review of a jury's resolution of conflicts in expert witness opinion testimony. See Petition, pg. 11. While this statement, on its face, is somewhat unremarkable, the case law upon which Petitioner then relies to argue that the Ninth Circuit abused this rule in granting Smith's Petition does not support his contention.

In Moore v. Deckworth, 443 U.S. 713 (1979), this Court did not consider

the issue of a jury's verdict based upon conflicting expert testimony, but rather, simply affirmed a decision of the Seventh Circuit Court of Appeals, upholding an Indiana State law which allowed the jury to make sanity decisions based upon lay testimony, and its finding that there was sufficient lay testimony to support the jury's verdict.

Petitioner's reliance upon Aucion v. Jones, 759 F.2d 449 (5th Cir. 1985) is misplaced since there was no issue of conflicting expert testimony in the case. The defendant presented evidence that she was intoxicated on drugs at the time she killed her young daughter. In response, the prosecution psychiatric expert testified that she was nonetheless capable of forming the necessary intent to kill despite her drugged condition. No defense expert testified to the contrary.

In relying upon Weeks v. Scott, 55 F.3d 1059 (5th Cir. 1995), petitioner characterizes the decision by the Fifth Circuit as an issue involving a conflict between prosecution and defense experts concerning whether the H.I.V. virus could be spread by saliva. The two H.I.V.- qualified experts called by the prosecution testified that H.I.V. could possibly be transmitted by saliva, citing to approximately ten cases of transmission through saliva, while the defense H.I.V. - qualified expert opined that the chance of such transmission was "extremely remote. . ." 55 F.3d at 1063.

Petitioner asserts that United States v. Boynton, 63 F.3d 337 (4th Cir. 1995), stands for the proposition that prosecution and defense experts differed regarding an agricultural practice. In fact, the prosecution presented evidence from an agronomy expert, a soil erosion control expert, and written materials prepared by the U.S. Fish and Wildlife Service. In response, the defense presented the testimony of a natural resources police officer and his son concerning certain agricultural practices. This case is hardly one in which there was conflicting expert opinion since the defense witnesses were not qualified as experts in any area.

Next, Petitioner relies upon Brewer v. Overburg, 624 F.2d 51 (6th Cir. 1980), for the proposition that a murder conviction rested upon conflicting expert testimony regarding the possible accidental firing of the murder weapon. While the Sixth Circuit, in affirming the district court's denial of the state prisoner's habeas petition, indicated that there was conflicting testimony about the possibility of an accidental firing of the murder weapon, the court went on to point out that there was other substantial evidence supporting the conviction. This evidence included the victim's son, who testified that the defendant had argued with his mother, had been gone to a bedroom and obtained the gun and the son then heard his mother cry "Oh no" followed by a gun shot. In addition, other witnesses

testified about frequent arguments between the defendant and the deceased. 624 F.2d at 52. While there was conflicting expert testimony, the jury's verdict was based upon other substantial evidence of guilt.

Petitioner then relies upon an unpublished opinion in Harding v. Bock, 107 Fed. Appx. 471 (6th Cir. 2004), for the proposition that the parties' experts differed as to the cause of death. In fact, the prosecution called two experts who were qualified as forensic pathologists, who testified as to the cause of death. In response, the defendant called a family practitioner, who offered a different opinion as to the cause of death. While the defense expert offered a different opinion, he did not appear to have the qualifications to support his opinion.

Petitioner then cites to United States v. Oliver, 278 F.3d 1035 (10th Cir. 2001), for the proposition that expert testimony is "solely within the province of the jury" to weigh and resolve. See Petition, pg. 14. While there was conflicting expert testimony concerning the reliability of a bank teller's eyewitness identification of the defendant, Petitioner fails to point out that the jury also was able to rely upon the testimony of a cooperating co-defendant who implicated the defendant in the bank robberies, as well as surveillance photographs of the defendant from the bank which the jury relied upon in convicting the defendant. 278 F.3d at 1042-43.

Petitioner then relies upon Bottoson v. Moore, 234 F.3d 526 (11th Cir. 2000), for the proposition that "where there is conflicting testimony by expert witnesses, as here, discounting the testimony of one expert constitutes a credibility determination, a finding of fact." See Petition, pg. 14. Petitioner fails to mention that this is not a case involving a sufficiency of evidence issue after a jury trial, but rather an issue related to a defendant's claim of ineffective assistance of counsel after the defendant was convicted and sentenced to death.

At an evidentiary hearing concerning a habeas petition, a state judge, not a jury, accredited the testimony of a prosecution psychiatrist concerning the defendant's mental health and competency at the time of his trial, some ten years earlier, and discredited the opinion of a defense psychiatrist concerning the defendant's mental health. This expert testimony was not based upon any physical findings, or lack thereof, as is raised in the instant case, but rather differing opinions of mental health experts concerning a defendant's mental health and sanity a decade prior to their testimony. This decision is hardly relevant to the issue raised in this case.

Next, Petitioner relies upon Knapp v. Leonardo, 46 F.3d 170 (2nd Cir. 1994), a case in which experts offered different opinions concerning the time of death of the victim. However, the issue decided by the jury was whether the defendant

"consciously disregarded an unjustifiable risk to [the victim's] health." 46 F.3d at 178. In addition to the expert's differing opinions, the jury was able to rely upon a co-defendant's testimony that the defendant had asked him to falsely testify to an alibi, that the defendant had admitted murdering the victim, and that the defendant was arrested when he attempted to move the victim's corpse from one location to another, evidence which supported the jury's second-degree manslaughter verdict.

Petitioner then relies upon Miller v. Leapley, 34 F.3d 582 (8th Cir. 1994), again a case in which there was differing expert testimony concerning the time of the victim's death. Petitioner fails to point out that there was other substantial evidence pointing to the defendant's guilt, including the fact that the defendant demanded ransom money in exchange for the safe return of the victim, retrieved the ransom money, gave police five differing and conflicting stories concerning his involvement in the case, as well as evidence of hair, fiber and blood samples supporting the prosecution's assertion that the victim had been transported in the defendant's car. This is yet another case in which the jury had substantial evidence, other than the expert testimony, upon which to base their verdict.

Petitioner then offers a series of cases for the proposition that a determination of whether to credit expert testimony is within the exclusive province of the jury. In these cases, while there is differing expert testimony

presented to the juries, the issues in all of the cases concern the defendant's sanity, mental health, and/or competency to stand trial. These cases include United States v. Bramlet, 820 F.2d 821 (7th Cir. 1987); Strickland v. United States, 316 F.2d 656 (D.C. Cir. 1963); United States v. Signa, 555 F.2d 226 (9th Cir. 1977); People v. Ledesma, 39 Cal.4th 641 (2006); People v. Marshall, 15 Cal.4th 1 (1997); People v. Wolff, 61 Cal.2d 795 (1964). See Petition, pgs. 14 - 15.

Cases in which expert psychiatrists offer differing opinions concerning the defendant's sanity and/or mental health are hardly comparable to the sufficiency of evidence issue raised in this case, where a group of pathologists and one pediatrician relied upon uncontroverted physical evidence from a gross autopsy, a neuropathological exam and an eye pathology exam in reaching their various opinions concerning the infant's cause of death.

Next, Petitioner cites to People v. Poe, 74 Cal.App 4th 826, 88 Cal.Rptr.2d 437 (1999), for the proposition that the jury has the exclusive province to credit expert testimony. The Poe case does not involve any determination by a trial jury concerning conflicting expert testimony but rather is a decision by a state court judge finding that there was sufficient evidence that an inmate was likely to engage in violent sexual behavior if released from prison, a finding which was necessary in order for the state to continue hold the inmate in state custody. The

decision in this case obviously has nothing to do with any jury determination concerning expert testimony.

III.

CONCLUSION

The Petition for Writ of Certiorari should be denied. Petitioner has mischaracterized the issue in this case by claiming that the Ninth Circuit Court of Appeals chose the testimony of defense experts over the testimony of prosecution experts, despite the trial jury's finding to the contrary. In fact, the Ninth Circuit Court of Appeals was clear when it found that the hypothesis advanced by the LA County Coroners Erlich and Carpenter, that the baby died as a result of violent shaking which tore or sheared the brain and/or the brainstem, failed to meet the mandate of proof beyond a reasonable doubt since the same experts admitted that there was no evidence of any tearing or shearing of the brain or the brainstem in this case. The coroners' hypothesis of "instant death/no observable brain injury" was constitutionally insufficient to support the jury's finding of guilt.

Dated: 1/19/2007

Respectfully submitted,

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Shirley Ree Smith, Respondent